2008

# Golden Meadows Properties LC, Golden Meadows Properties LLC v. Michael Strand and Cari Allen : Brief of Appellant

Utah Court of Appeals


James C. Swindler; Prince, Yeates Geldzahler; Wayne Petty; Moyle and Draper; attorney for appellee.
Michael Strand, Cari Allen; pro se.

IN THE UTAH COURT OF APPEALS

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| GOLDEN MEADOWS PROPERTIES L.C., aka GOLDEN MEADOWS PROPERTIES LLC<br><br>Plaintiff and Appellee,<br>vs.<br><br>MICHAEL STRAND and CARI ALLEN,<br><br>Defendants and Appellants. | BRIEF OF APPELLANTS'<br><br>District Court No. 070700488<br><br>Appellate Court No. 20080838-CA |

APPEAL FROM SECOND JUDICIAL DISTRICT COURT
DAVIS COUNTY, STATE OF UTAH

THE HONORABLE JUDGE GLEN R. DAWSON, PRESIDING

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ADDENDUM

1. Utah Code §78-36-10.3. §78-27-56. Utah Rules of Civil Procedure 56(e) and (c), and, Utah R. Evid. 613 (b).

Courtesy Copies of Documents Supporting Defendants Claims for Oral Argument filed 07/25/08

2. April 25, 1983 $2,000 check by Strand (d.b.a. B.I. Associates) to Nupetco Associates and (Wayne Petty) Moyle & Draper for legal fee's / Excerpts of Attorney Dan Jackson's billing statements dated June 30, 1985 [sic] 1983 and November 20, 1985.

3. Affidavit of Michael Strand dated March 20, 1985. (Civil No. C 85-0351W)

4. Second Amended Complaint dated September 23, 1985. (Civil No. C 85-0351W)

5. Affidavit of Lohr Livingston dated March 1985 (Civil No. C 85-0351W)

6. Attorney Dan Jackson's Affidavit dated February 28, 2008.

## JURISDICTIONAL STATEMENT

This Court has jurisdiction under Utah Code § 78-2-2(3)(j) U.C.A. (1953), as amended governing appeals transferred from the Supreme Court to the Court of Appeals. The final order was entered on September 15, 2008[1]. Defendants filed the notice of appeal on September 29, 2008[2], which was timely under Utah R. App. 4(a).

## STATEMENT OF ISSUES PRESENTED AND STANDARD OF REVIEW

1. Whether the trial court's discovery rulings and denial of the Appellants' Rule 56(f) Motion were an abuse of discretion and a denial of due process? Trial Court's discovery rulings are reviewed for abuse of discretion. *Pete v. Youngblood*, 2006 UT App 303, ¶7, 141 P. 3D 629, *Pack v. Case*, 2001 UT App 232, ¶ 16, 30 P. 3d 436. Denial of a Rule 56(f) Motion is for abuse of discretion. *Crossland Sav. v. Hatch*, 877 P. 2d 1241, 1243 (Utah 1994). Constitutional issues, including that of due process are questions of law that are reviewed for correctness. *In re K.M.*, 965 P. 2d 576, 578 (Utah Ct. App. 1998). These issues were raised by filing Motions to Compel and a Rule 56(f) Motion. [R. 396, 483,587, 598, 1321, 1410] and, (ii) the Appellants' Rule 59 Motion [R. 2526, 2534, 2528, 2532, 2577].

2. Did the trial court abuse its discretion in striking affidavits or portions thereof or in the alternative when it denied the pro-se Defendants "newly engaged" counsel's oral motion for leave to correct the deficiencies in the pro-se affidavits if any existed? Whether the affidavits set forth admissible evidence is a legal question reviewed

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[1] [R. 2936]
[2] [R. 2938]

for correctness. *Orvis v.Johnson*, 2008 UT 2, ¶6 (citations and internal quotation marks omitted). Review of a trial court's denial of a motion to amend pleadings is for abuse of discretion. *Kasco Servs. Corp. v.Benson,* 831 P.2d 86, 92 (Utah 1992). This issue was raised by filing objections to the Motions to Strike [R.1914, 1922, 1925, 1933, 1963, 2028] at oral argument during the Summary Judgment hearing [R. 4301at 106, 107, 108 lines 1-7, 118 lines 17-25, 119 lines 1-25, 120 lines 1-4] and in connection with the Appellants' Rule 59 Motion [R. 2526, 2534, 2528, 2532, 2577].

3. Did the trial court abuse its discretion in striking affidavits filed concurrently with the responsive memorandum on grounds for lack of timeliness? A trial court's decision to admit or exclude specific evidence is reviewed for abuse of discretion. *State v.Cruz-Meza,*2003 UT 32 para 8, 76 P. 3d 1165. This issue was preserved by filing the affidavits [R. 1753,1771] and, by the Court in accepting; the memoranda [2702] and, one of the affidavits as timely [R. 4301pg. 40 lines 22-25, pg. 41 lines 1-3] and, also in connection with the Rule 59 Motion [R.2526, 2534, 2528, 2532, 2577].

4. Did the trial court abuse its discretion in striking affidavits filed after the initial response memorandum, where plaintiff had adequate opportunity to respond to the statements in the affidavits and no rule prohibited the filing of the affidavits? A trial court's decision to admit or exclude specific evidence is reviewed for abuse of discretion. *State v. Cruz-Meza,* 2003 UT 32 para 8, 76 P. 3d 1165. This issue was preserved by filing the affidavits [R. 1930,1949, 2033, 2073], during oral argument [R.4301 pg. 45 lines 13-17] and, by the Court in connection with the Rule 59 Motion [R. 4304 pg.46 lines 10-20]

5. Was summary judgment precluded by material factual disputes concerning

the nature of the transactions and the parties intent and; by reason that the Court reviewed the evidence and all reasonable inferences in the light most favorable to them rather than the Appellants? On review of a grant of summary judgment to a plaintiff, the inquiry is "whether there is any genuine issue as to any material fact, and if there is not, whether the Plaintiffs are entitled to judgment as a matter of law" *Thorncock v. Cook* 604 P. 2d 934 (Utah 1979). Review is for correctness affording no deference to the trial court. *Ford v.American Express Fin. Advisors*, 2004 UT 70 ¶21. 98 P.3d 540.When considering a motion for summary judgment, the appellate court views the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. *Carrier v. Salt Lake County*, 2004 UT 98 ¶3, 104 P. 3d 1208. This issue was raised in Opposition to ;the Motion in Limine [R.1600, 1862], the Motion for Summary Judgment [R.1837], the proposed order [R. 2221] and, in connection with the Rule 59 Motion [R. 2526, 2534, 2528, 2532, 2577].

6. Whether the trial courts decision to award attorney fee's to the Plaintiff in the amount of $113,301.15 was in error and or an abuse of discretion. Review is for correctness, patent error or clear abuse of discretion. *Keith Jorgensen's , Inc. v. Ogden City Mall Co.*, 2001 UT App. 128, ¶11, 26 P. 3d 872 This issue was raised by filing an objection to the Affidavit for Attorney Fee's [R.2358, 2378, 2350, 2354] during oral argument at the 06/30/2008 telephonic hearing [R. 4302] and in connection with the Rule 59 Motion [R. 2534]

7. Whether the trial Court abused its discretion when it denied the Defendants Rule 59 Motion? Review is for abuse of discretion. *Child v. Gonda* 972 P. 2d 425 (Utah

1998). This issue is properly raised on appeal.

## CONSTITUTIONAL PROVISIONS AND STATUTES AND RULES

The text of the following Constitutional provisions, statutes and rules are set forth in the Addendum. - Utah Code §78-36-10.3 and §78-27-56. Utah Rules of Civil Procedure 56(e) and (c) and, Utah R. Evid. 613 (b).

## STATEMENT OF THE CASE

A. Nature of the Case. This is an appeal from an Order granting Plaintiff/Appellee Golden Meadows Properties, LC aka Golden Meadows Properties, LLC ("GM") Motion for Summary Judgment[3] establishing ownership of the Property in favor of GM for the purpose of evicting Defendant/Appellant Michael Strand ("Strand") from his home of 32 years and Defendant/Appellant Cari Allen ("Allen") from her home of 15 years and an award of damages to GM in the amount of $39,600 for unlawful detainer and attorney's fee's and expenses on all aspects of this case in the amount of $113,301.15 under Utah Code §78-36-10.3.

Strand purchased the property in 1976, possessed it ever since and continuously claimed ownership of the home. Strand had allowed the home to be titled in the name of GM and it's predecessors in interest in reliance on Neuman Petty's (the manager of Nupetco Associates, the sole member and manager of GM) promises and assurances to Mr. Strand that it was being held in trust for his benefit. Although attorney's fees were Awarded to GM for defending against the Appellants' Counterclaim, no bad faith

[3] By reason of the fact that the Court found that the pleadings, affidavits (as narrowed by the Order Concerning Motions to Strike [Appellants] affidavits) and other papers submitted to the Court do not raise a genuine issue of material fact [2703¶2].

was found on the part of the Appellants pursuant to §78-27-56.

B. Course of Proceedings and Disposition Below. The record on Appeal contains approximately 305 entries and is just shy of 3,000 pages of documents, excluding the transcripts. Therefore this statement presents a general overview.

GM filed its Complaint in this matter on August 30, 2007 seeking relief under the unlawful detainer act [R. 1]. The Appellants filed an Answer and Counterclaim on September 10, 2007 that alleged causes of action titled (1) "Bad Faith," (2) "Quiet Title Action," (3) "Breach of Fiduciary Duty," and (4) "Breach of Constructive Trust" [R. 20, 39]. GM filed its reply to the Counterclaim on October 1, 2007 [R. 94].

At a hearing held on October 24, 2007, the Court entered into technical legal dialog with GM counsel and set an expedited "prospective" Scheduling Order under the unlawful detainer act [R. 4299].

On October 31, 2007 GM filed a Motion to Compel Production of Documents and To Impose Sanctions and on November 28, 2007, the Court overruled the Appellants objections and granted that Motion[4]. Thereafter, GM conducted three days of Depositions. 2.5 of which it conducted upon Strand. Even though Allen requested on behalf of herself and Strand at the outset of the depositions that they be sent the originals for review, signatures and changes if necessary, they were not made available to the Appellants [R. 593 ¶6]. The depositions were not fully admitted before the Court [R. 620-650, 672-680, 2189-2184] and the transcripts were sealed by GM counsel and would not be released, even for review, without paying the Court reporter and video fees in an

[4] [R. 198, 200, 229, 266, 358, 364, 372, 375, 378, 380, 388, 390]

amount of $5, 264 [R. 2272].

On January 8, 2008 the Appellants filed Motions to Compel Answers to Interrogatories and Production of Documents along with requests for Suspension of the Court's Scheduling Order. GM moved to strike both Motions and also filed Memoranda in Opposition[5]

On January 16, 2008, GM filed a Motion for Summary Judgment along with six accompanying affidavits[6] and on January 29 the Appellants filed a pleading titled "Motion for Stay and Motion to Enlarge time to Respond to Motion for Summary Judgment." The Motion sought relief under Rule 56(f) of the Utah Rules of Civil Procedure[7].

GM filed a Motion in Limine to exclude evidence relating to the Appellants' defenses and Counterclaim dated Jan. 31, 2008 [R. 1180, 1192, 1559, 1562, 1600, 2051].

The proposed Pre-Trial Order was due on Monday February 11, 2008 and was not served on the Appellants for review and comment until Friday Feb. 8 at 3:30 p.m. The Appellants filed an objection and again moved the Court to alter its Scheduling Order [R.1521].

At the hearing held on February 13, 2008, the Court took argument from Allen and from GM counsel and thereafter, denied the Appellants Motions to Compel and their Rule 56(f) motion as an abuse of the discovery process. When Strand tried to address the

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[5] [R. 396, 483, 583, 587, 594, 598, 1126, 1130, 1141, 1145, 1154, 1321, 1410, 1467]

[6] [R. 601, 705, 860, 907, 929, 965, 969, 993, 1124, 1128]

[7] [R.1162, 1166, 1183, 1477, 1495, 1556]

Court, Judge Dawson abruptly left the Bench [R. 4300]. By its ruling, the Court effectively denied the Appellant's motion to dismiss for failure to include indispensable party or to join Nupetco Associates, Neuman Petty, Wayne Petty and Ralph Petty as parties' plaintiff that was filed on Feb. 13 prior to the hearing [R. 1548, 1550]. The Court indicated that the pre-trial order was to be filed with the court by February 19, 2008 (within 4 business days) and that the Appellants failure to cooperate could result in a striking of their answers and a default judgment being entered. Off the record the Court indicated that the Appellants would have until Wednesday February 20, 2008 to respond to the Motion for Summary Judgment [R. 1548, 1911, 2048, 4300].

When the parties were unable to agree on the content of the pre-trial order by the close of February 19, 2008 each party submitted their own proposed order [R. 1567, 2157, 2140].

The Appellants filed a Memorandum in Opposition to the Motion for Summary Judgment along with a Countermotion and submitted ten accompanying Affidavits. Six of the Affidavits were served on February 20. Based on stipulation by the parties the Appellants responsive memorandum and the rest of the affidavits were served on February 22[8]. GM moved to strike significant portions or virtually all of the Affidavits Appellants submitted, along with motions to reduce time and for expedited hearing. In response to the Motions to Strike the Appellants also submitted supplemental affidavits and the Affidavits of Charles Dooley and attorney Daniel Jackson. GM moved to Strike

[8] [R. 1837, (1852, 1860, 1862), 1605, 1673, 1753, 1771, 1810, 1813, 1817, 1828, 1831, 1834, 2057, 2060]

these affidavits as well[9].

The Appellants had represented themselves pro-se, but obtained pro-bono counsel to represent them at the Summary Judgment hearing after the Court threatened to strike their Answers and enter a default judgment against them and GM moved to strike their affidavits on grounds that they were procedurally deficient [R. 2042, 4301 pg. 71 lines 1-21].

GM filed its response in support of its motion for summary judgment on February 28 and submitted its pro-posed order granting the motion. The Court held a hearing on GM's Motion for Summary Judgment and its various Motions to Strike Monday March 3, 2008. The hearing was continued to and concluded on Wednesday, 03/05/2008 [R. 1975, 2001, 4301]. The Court denied the Appellants' Countermotion because it was not filed within the January 15 deadline set for the Court for filing motions. The Court struck significant portions or virtually all of the Appellants supporting Affidavits and granted GM Motion for Summary Judgment. Before the Court so ruled the Appellant's "newly engaged counsel" requested that the Court liberally construe the pro-se Appellants' pleadings and affidavits and made an oral motion for leave to correct the deficiencies in the Affidavits if any existed and to amend to the Counterclaim to clarify the adverse possession and constructive trust claims [R. 4301 Tr. pg. 106, 107 and 108 lines 1-7, 118 lines 17-25, 119 lines 1-25, 120 line 1-4]. By its rulings on Golden Meadow's Motions to Strike and on its Motion for Summary Judgment the Court effectively denied those

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[9] [R. 1568, 1570, 1576, 1579, 1581, 1595, 1597, 1864, 1866, 1871, 1873, 1879, 1881, 1886, 1888, 1897, 1899, 1902, 1914, 1922, 1925, 1933, 1949, 1963, 2002, 2005, 2024, 2028, 2033, 2066, 2068, 2073]

requests[10]

The Appellants filed a Rule 59 Motion for New Trial and Motion to Amend the Judgment for Irregularities in the Proceeding which Prevented them from Having a Fair Trial [R. 2526-2534]. GM opposed the motion by memorandum filed on June 9, 2008 [R. 2569]. The Appellants response was filed on June 18, 2009 [R. 2569, 2620, 2695] and was supplemented with additional documents that substantiated the Appellants' argument. Even though these documents (as reflected in the Addendum) were filed with the Clerk they do not appear on the record and at the telephonic hearing held on September 3, 2008, the Court instructed the Appellant's counsel to pick them up or they would be destroyed[11]. The Court entered the Order denying the Appellants Rule 59 Motion on September 15, 2008 and on September, 29, 2008; the Appellants filed the Notice of Appeal.

C. Statement of Facts. This statement presents a general overview of the background facts necessary to understand this case and the arguments contained in this brief. This appeal asserts the facts were disputed, so those facts are discussed in more detail in the argument section of this brief.

1. Nupetco Associates ("Nupetco') is the sole member and manager of GM and is owned and controlled by Neuman Petty and his family including two of his sons;

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[10] [R. 2199, 2210, 2213, 2217, 2221, 2280, 2290, 2477, 2702].

[11] [R. Tr. 4304 pg. 2 lines 4-25, pg. 3 lines 1-25, pg. 4 lines 1-25, pg. 5 lines 1-25, pg. 6 lines 1-25, pg. 7 lines 1-25, pg. 8 lines 1-5 (2891, 2927)].

attorney Wayne Petty and attorney Ralph Petty [R. 596 Answer to Interrogatory No. 19].

2. Strand purchased the Property in 1976 [R. 1838 at ¶2] and during the 1980's Strand and his entities (including B.I. Associates) and Neuman Petty ("Petty") and his entities (including Nupetco) executed an agreement (the Joint Venture "Agreement") for an oil drilling and production venture in the Overland Dome Filed, Wyoming [R. 603 ¶5, 650, 2704]. In this regard Petty's contribution was approximately $750,000 that was comprised of $309,000 debt owed them by Strand and the amount required to pay off the mortgages to three properties: Strands Bountiful home, "the Property," Strand's parents home, "the Pages Lane Property," and Strands parents rental property, "the Dexter Street Property," [R. 287-288 ¶¶'s 14-16] and to hold these properties in trust for the Strands until such time as Petty's investment, as per the Nov. 16, 1982 "Agreement," was recouped [R. 486]. Strands contribution was $3,000,000 in claims and production equipment worth $3,200,000. Legal counsel to Strand and Petty were attorney's Wayne Petty and Daniel Jackson [*See* Addendum at 2 and R. 2073-2076].

3. In furtherance of their ongoing business arrangement, Strand and Petty engaged in a course of business dealings under which Strand would assign his assets to Petty and Petty would provide Strand with money to conduct his business affairs and cover his personal living expenses [R. 2075 ¶8, 289-290 ¶¶'s 30-31]. Following such assignments, Strand would continue to retain control of the underlying asset for the benefit of himself and Petty but, relied on Petty to make business decisions for their best interests [R. 2075 ¶9, Strand Depo. R. 2192 pg. 476 lines 16-25, and 2193 pg. 477 lines 1-25].

4. In consideration of the various assignments, transfers and conveyances of personal property given by Strand to Petty and, consistent with the consideration promised by Petty to Strand in the 1982 agreement, Petty acquired Strand's home (the "Property") in the name of Nupetco on September 5, 1985 from the Citizen's Bank purported foreclosure sale for the benefit of Strand. Strand was fine with that arrangement. The actions of Petty and Strand were directed at maximizing the value of Strand's assets for the purpose of benefiting both Strand and Petty[12].

5. In 1997, five years after Allen met and moved in with Strand [R. 1754 ¶7 (first line) and 1756 ¶17 (first sentence)] and while Strand was still in Federal Custody (Half-way house), Petty explained to Strand and Allen that he wanted to put the home back in Strands name but that he (Petty) needed to raise some money for one of his projects. Petty wanted Strand to get a mortgage loan and show Strand buying the home from Nupetco so that he (Petty) would get the money he was seeking. Petty told Strand and Allen that he would make all the payments on a loan if Strand could obtain one [R 1931 ¶3]. Thereafter, Petty, through his title company named LandMark Title, cleared the exceptions on the chain of title, particularly, the fictitious Assumption of the Senior Trust Deed and Trust Deed Note held by Equitable Life & Casualty that Petty had filed with Davis County Recorders Office on August 27, 1990, as an Agreement [R. 1688, 1686,

[12] [R. 2075-2076¶¶'s 14-16 and ¶18, 1775 ¶¶'s 17-19, Strands Depo. at 103 lines 24-25 [R. 626], 106 lines 8-25 [R. 627], 108 lines 12-25 [R. 628], 109 lines 1-2 [R. 629], 120 lines 13-15 [R. 630], 122 lines 1-25 [R. 632],123 lines 1-25 [R. 633], 124 lines 1-4 [R. 634], 126 lines 8-25 [R. 636], 127 lines 1-25 [R. 637], 128 lines 1-25 [R. 638] and, 129 lines 1-25 [R. 639].

1687, 1685]. Petty also worked with a mortgage company ("1st Choice Mortgage") in an effort to consummate a loan for Strand. Ultimately the mortgage company aborted the transaction due to irregularities [R. 2033; 1686, 1687, 1685]. When the transaction failed, as per instructions from Strand, LandMark Title who was facilitating the proposed transaction returned the down payment that Petty had deposited with them, back to Petty [R. Strand 1951-1952 ¶3 and Allen 1931¶4].

6. On 07/21/2000, for the stated purpose of augmenting the return of the Property to Strands name, and, under the auspices of LandMark Title, Nupetco conveyed Strand's home to Allen's brand new company named Log Furniture, Inc. ("LFI") by way of a fictitious Uniform Real Estate Purchase Contract after Allen for LFI and Petty as the manager of Nupetco signed a "Disclaimer" holding LandMark Title harmless [R. 691, 1684]. The Real Estate Purchase contract that was signed by Allen for LFI and Petty as the manager of Nupetco states that Nupetco sold the home to LFI for $390,000 and that there was no loan or financing involved [R. 561-566, 681-686, 1702-1707]. The $390,000 cashiers check that financed the transaction was purchased by Nupetco with Nupetco's funds [*See* top of R. 1331 (circled in blue)]. In spite of these facts, and also under the auspices of LandMark Title, Petty also caused Allen to sign a fictitious promissory Note and Deed of Trust on the Property in favor of GM securing the Note with the property. Petty signed this second set of documents as the manager of GM and caused the bank to label the $390,000 cashiers check to state on its face that it was purchased by GM, rather than the true purchaser, Nupetco [R.704 (compare with 1331)]. As part of this transaction, Petty also caused Allen sign a personal guarantee and took

ownership of 100% of the issued and outstanding stock of LFI [R. 687-690,736-737].

7. When Strand found out about the 07/21/2000 transaction, and that Petty had promised and assured Allen that (i) the transaction was only temporary and that it was something he had to do for "Uncle Sam" (ii) that Strand had okayed it (iii) that there would be no financial obligation on LFI's or Allen's part whatsoever (iv) that the transaction was a way of getting the house back in Strands name and; (v) that Petty and his son, attorney Ralph Petty had expected Strand to sign the guarantee along with Allen, Strand called Petty immediately on his speaker phone in Allen's presence and asked Petty what he was doing. Petty also promised and assured Strand that (i) the transaction was only temporary and that it was something he had to do for "Uncle Sam" (ii) that there would be no financial obligation on LFI's or Allen's part whatsoever and; (iii) that the transaction was a way of getting the house back in Strands name [R. 1777 -1778 ¶27, 28, R. 1754-1755 ¶¶'s 4-14, 51¶¶'s 7, 8].

8. Despite having prior knowledge of Strands claim of ownership to the Property, one of LFI's creditors ("MHS") executed against the Property in September 2003 and purchased LFI's alleged interest for $5,000. MHS did not challenge Strand's occupancy or ownership of the home and, for the benefit of Strand and Petty [R. 1843 ¶21, 1778 ¶29, 1756 ¶18 (last sentence) and ¶19], GM, represented by attorney Ralph Petty (as trustee), utilized the fictitious Note and Deed of Trust to hold a foreclosure sale on October 31, 2003 in an effort to clear title of LFI and its creditor. The Green Affidavit filed by GM in support of its motion for summary judgment states vesting in GM to be November 19, 2003, the date that Ralph Petty filed the Trustee's Deed [R. 996 ¶15 (last

line)].The check that paid for the fee's involved in that foreclosure sale came from Nupetco signed by Neuman Petty to Ralph Petty (as trustee) with a notation on the memo that it was charged to Strand [R. Trustee's Deed 1855-1858, Check 1859 (1361, 1362-1367)].

9. Strand and Petty continued to act as co-partners until July 15, 2005 when Petty repudiated the joint venture [R. 295-296 ¶¶'s 63-72]. On October 3, 2005 Petty sent a letter to Strand that stated that Petty owned the oil field and everything in it was his including; four producing wells, Strands 3.2 million dollars worth of production equipment and the proceeds from the sale of oil and the sale of surplus equipment. Petty also stated that:

> "As to the other matters raised in your letters, and others not mentioned (for example, Log Furniture and the Bountiful house), I am completing my review and will be prepared to discuss them with you soon. I will advise you when I am prepared to talk about them or I will advise you in writing of my position." [R. 2606]

10. Strand obtained legal counsel[13] and entered into settlement negotiations with Petty through his two attorney sons, Wayne Petty and Ralph Petty. During the negotiations, Strand's counsel discussed the issues [R. 2379¶ 3] and supplied the Petty's a draft copy of Strand's proposed complaint against Petty and Nupetco [Tr. R. 270 (last paragraph) - 271]. The Complaint alleged each parties contribution and causes of action titled "Breach of Joint Venture Agreement," "Fraud," Negligent Misrepresentation," "Breach of Fiduciary Duty," "Conversion," "Unjust Enrichment," and, "Accounting" [R.

[13] Justice D. Frank Wilkins of Berman & Savage until his untimely death in 2006 and Sidney Baucom, Andrew Stone and Mark Tolman of Jones Waldo Holbrook & McDonough.

285-311]. The Petty's retained outside counsel, attorney James Swindler and, joined GM as a party to the negotiations [R.554]. On July 12, 2007, Strand's counsel supplied Mr. Swindler copies of Strands personal and legal documents from the early 1980's through the present [R. 190-191 and 2379 ¶4]. Thereafter, Petty and his counsel failed and refused to provide their documents [R. 4299 pg. lines 3-11] and, the requested accounting for the income received by Petty and his entities from the oil produced in the Overland Dome Field and for revenues received by Petty and his entities from the assets assigned to them by Strand [R. 296 ¶¶'s 70-72].

11. On August 15, 2007 Allen discovered case no. 040700433 (GM v. Cari Allen) and moved to set aside (i) the May 10, 2004 foreclosure sale that GM alleged it also conducted against the property and (ii) the almost half a million dollar default judgment that Petty and his attorney son Ralph had taken against her for an alleged deficiency on the fictitious LFI Trust Deed and Trust Deed Note that they alleged that Allen owed. Thereafter, on August 23, 2007, GM served a five day "Notice to Quit" on each of the Appellants that declared that they were tenants at will occupying "the Property" (Strand's home of 32 years) at the pleasure of GM and demanded that Strand and Allen vacate the house and leave the furniture and personal property that belonged to Nupetco Associates, despite the fact that it was GM serving the Notice to Quit, and Nupetco was not listed as party plaintiff [R. 4, 654-655, 656-657].

## SUMMARY OF ARGUMENT

The Appellants argue that they were prejudiced by not being given the right to due process and precluded from discovering and presenting facts relevant to the subject

matter involved in the pending action and to determine GM's standing and Judge Dawons subject matter jurisdiction. That the material facts were disputed. By not receiving the Affidavits and or the Affidavit testimony submitted by the Appellants' in opposition to the Motion for Summary Judgment the Court failed to determine the existence of issues of fact. The attorney fees were unreasonable, an action to quiet title does not provide for attorneys fees under §78-36-10.3 and, there was not attempt to apportion. And, lastly, that the Summary Judgment ruling is irregular to the extent that the Court ruled on issues when the Appellants were not given any ability to present relevant information.

## ARGUMENT

### I. THE APPELLANTS WERE PREJUDICED BY NOT BEING GIVEN THEIR RIGHT TO DUE PROCESS AND PRECLUDED FROM DISCOVERING AND PRESENTING FACTS RELEVANT TO THE SUBJECT MATTER INVOLVED IN THE PENDING ACTION.

"[S]tanding is a jurisdictional requirement that must be satisfied before a court may entertain a controversy between two parties. Under the traditional test for standing, the interests of the parties must be adverse and the parties seeking relief must have a legally protectible interest in the controversy." *Jones v. Barlow*, 2007 UT 20, ¶12, 154 P. 3d 808. GM was able to evade this requirement and the merits of the case by changing its theories, by withholding crucial information and by hiding behind Neuman Petty and his corporate entities. For Example; A decree quieting title cannot be entered in an unlawful detainer action. *Thomson v. Reynolds* 53 Utah 437, 174 P. 164 (Utah 1918). Title to the land is not involved in the unlawful detainer action. *Welling v. Abbott*, 52 Utah 240, 173 P. 245 (1918) and, it is not the purpose of an eviction action to try title to the land *Williams v. Nelson*, 65 Utah 304, 237 P. 217. Under principles of standing, a party may

generally assert his or her own rights, and cannot raise the claims of third parties who are not before the court. *Provo City Corp. v. Thompson*, 86 P. 3d 735 (Utah 2004).

The records show that the home was titled in Strand's name from 1976 through September 5, 1985 [R. 1680 at ¶2] and thereafter from September 5, 1985 through 07/21/2000 was titled in Nupetco's name [R. 1631 at ¶11 first sentence]. In spite of these facts, GM filed its Complaint in this matter under the unlawful detainer act alleging that GM acquired ownership of the Property prior to 07/21/2000 [R.1at ¶4].

The Real Estate Purchase contract that was signed by Allen for LFI and Petty as the manager of Nupetco states that Nupetco sold the home to LFI for $390,000 and that there was no loan or financing involved [R. 561-566, 681-686, 1702-1707]. The $390,000 cashiers check that financed the transaction was purchased by Nupetco with Nupetco's funds [*See* top of R. 1331 (circled in blue)]. In spite of these facts;

i) On November 7, 2007 Neuman Petty testified in Federal Court that: "Log Furniture, Cari Allen, Mike Strand wanted to buy a home in Bountiful (the "Property") and the home was owned by Nupetco Associates. We agreed upon a price and details. And in order to effect a tax free exchange, a 1031, Nupetco –well GM loaned Log Furniture $390,000, with which they purchased through LandMark Title, a property on Federal Heights Drive, and made an exchange with Nupetco for the home in Bountiful" [R. 474-477 (476 lines 16-24) 532-534], and, in spite of this admission;

ii) GM filed its Complaint under the unlawful detainer act alleging that it sold the Property (the Bountiful home) to Log Furniture Inc. on 07/21/2000 and that it financed the transaction [R. 1 at ¶4].

Golden Meadows further alleged that it was obtained the home in 2004 after LFI defaulted on its payment of its obligations under the Note [R. 2 at ¶5]. Despite this contention, as referenced in the statement of facts above, these facts are disputed and, are the subject matter of case no. 040700433 pending before Judge Memmott to determine through GM's claims what, if any, deficiency is owed by Allen following the alleged May 10, 2004 foreclosure sale; and to determine through Allen's counterclaims, whether the foreclosure sale was lawful *ab initio*, and whether GM has standing and title to the property that is the subject of this action [R. 1179 ¶4 and 2782-2784.] These issues would have been litigated in 2004 had Petty and his son attorney Ralph Petty not concealed this action and the almost half a million dollar default judgment they took against Allen, from the Appellants for three years [R. 44 ¶¶'s 12,14, 325-332, 2543]

In Reply to the Appellants' Counterclaim, GM alleged that GM paid the taxes at all times since it first acquired title to the property, that Nupetco paid all taxes for at least three additional years prior to GM's acquisition, that Nupetco acquired title as a bone fide purchaser, and that the Counterclaim is barred by reason of failure of the consideration promised by Strand to Neuman Petty in the alleged 1982 agreement [R. 94-99].

Later, at the hearing held on October 24, 2007, GM alleged that Mr. Neuman Petty obtained legal title to the property during the 1980's and received virtually nothing over the last 20 years for his investment and because of the impending litigation[14], the decision was made to file this action for him (Neuman Petty) to get the benefit of the property [R.

[14] (Strand et al., v. Petty et al. case no 070915796, that is inclusive of all the issues [R. 285-311 Contributions; Petty's 287-288 ¶ 14-16 and Strand's R. 288 ¶18-19 / See also: 505-511])

4299 Tr. pg. 24 lines 7-1]. Contrary to this assertion, the evidence before the Court was that Strand had satisfied his contribution and that Petty had received all of the monies due him under the joint venture and owed Strand no less than $11,000,000 and the deeds to Strands home, Strands parents' home and their rental properties [R. 71-81].

GM's last assertion that Nupetco purchased the property in 1985 at the Citizen's Bank foreclosure sale with its own funds for its own benefit, that Nupetco allowed the Strand's to occupy the Property pursuant to a lease and then at the will of, with permission from Nupetco, on 7/21/2000 Nupetco conveyed the property to LFI through a transaction that GM financed, that GM paid the taxes from 2000 through 2007 with its own funds and, that GM obtained ownership of the home in 2004 after Log Furniture defaulted on its payments [R.603-606 ¶¶'s 6-8,11,18-20], places facts surrounding the joint venture and GM's various theories, facts surrounding the transactions and the parties intent at issue and should have determined this was not an eviction case entitled to expedited treatment, particularly in view of Appellants' Counterclaim.

There were fact questions as to the source of funds used in the transactions, for payment of the taxes and, whether GM was an alter ego of Neuman Petty or its parent corporation, as would allow piercing of corporate veil, precluding summary judgment particularly when GM, Petty, and Nupetco displayed such a blatant unity of interest, ownership and co-mingling of funds that the separate personalities of the corporations and the individual no longer exists. It was clearly improper for the Trial Court to deny the Appellants' discovery motions seeking information about the source of funds used; (i) to purchase the Property at the Citizen's Bank foreclosure sale and allow GM to

litigate claims of Nupetco (i) in the 07/21/2000 transaction and allow GM to base its standing to evict Strand of his home of 32 years based solely upon the un verified statements by GM's counsel that Nupetco loaned GM the funds used in the 07/21/2000 transaction [R. 4300 Tr. pg. 10 lines 14- 22, 2049 ] and, writings created at the insistence of Petty [R. 604-605 ¶¶'s 11, 13, 14, 15,16 and 1754-1757 ¶¶'s 4-24, 1771¶¶'s29-30], and; (iii) for payment of the taxes and allow GM rely on checks that Petty produced as evidence to Strand and his attorney John Caine in 2004 [R. 2551-2552], that GM was paying the taxes with Strand's money at Strand's instructions - particularly in view of the fact that GM's deposits for 2002 (the only year produced) demonstrates that it's only source of funds comes from Nupetco [R.1333] and, GM did not offer any documentation to support Petty's testimony that GM reimbursed Nupetco for its payment in 2006.

GM did not comply with the 20 days imposed by the Scheduling Order nor the December 21, 2007 cut off date for production of documents [R. 1130 ¶2 and 2260 - 12/26/06 and 12/27/07 entries 593 ¶8]. It did not complete its production until January 9, 2008 [R. 2587]. It produced boxes of un-requested documents that the Appellants did not need [R. 591 last line and Footnote 1, R. 1135 2nd paragraph, R. 2354-2356 R. 2378-2381] and tampered with the records by withdrawing documents after they were sent to the printers[15]. It withheld crucial information[16] and simply refused to produce documents and answer most of the Interrogatories relating to its standing by quoting Allen's

[15] GM's counsel testified that it's copying costs were $509 [R 2246 ¶15, 2272]. The Appellant's invoice states that the printing charges were $478 [R. 2598]. At 16 cents a page plus tax, the Appellants were withheld, after they were sent to the printers, exactly to the penny, 362 pages of documents that the Appellants had marked for production.

testimony in matters unrelated to the present litigation [R. 534-535].

GM withdrew it's Sixteenth Defense that the Counterclaim is barred by reason of failure of the consideration promised by Strand to Petty in the alleged 1982 agreement [R. 542-543] and refused to produce documents or answer most of the Interrogatories relating to the Appellant's claims and defenses and GM's various theories by stating through it's agent, Neuman Petty, that the Appellants' requests were irrelevant, that GM has no information prior to its' existence in 1995 and that it has no knowledge of Mr. Strand's relationship with Neuman Petty and Nupetco [R. 442-464, 530-550]. Particularly in view of GM's motion summary judgment that is predicated on this very information that it claimed it had no knowledge or possession of, that it claimed was irrelevant and refused to produce.

A corporation's knowledge is entirely imputed to it from the knowledge possessed by its officers and agents. *Wardley Better Homes and Gardens v. Cannon*, 61 P. 3d 1009 Utah 2002. The matters recited by GM in its Reply to the Appellants Counterclaim, by it's counsel at the October 24, 2007 hearing and by Neuman Petty in support of GM's Motion for Summary Judgment concerned knowledge in the possession and control of GM that was not exposed in discovery and that there had not been sufficient time since the inception of the lawsuit for Appellants to utilize discovery procedures, and thereby have an opportunity to cross-examine the moving party. The pleadings had not been closed and there were complex legal issues posed, with an inadequate factual basis. Under such circumstances, it was an abuse of discretion to grant GM's motion. The Trial

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[16] As discussed below in Point I. **A** and **B.**

Court should have ordered a continuance to permit discovery, or denied the Motion for Summary Judgment, without prejudice to its renewal, after adequate time had elapsed in which Appellants could have obtained the desired information. *See Strand v. Associated Students of University of Utah* 561 P. 2d 191 (Utah 1977).

Mr. Strand suffered a traumatic brain injury in 2004 that has severely hindered his attempts to remember facts about his past without the benefit of documents [R 2529 ¶2-8, 2601-2602] and by it's ruling, the Trial Court precluded the Appellants from discovering crucial information to aid their position and defense at the initial stages of the case and to properly refute GM's Motion for Summary Judgment. If the Court had granted the Appellants' Motions to Compel and their request to amend the Court's scheduling order to allow for further discovery, depositions and motions and or the Appellants' Rule 56 (f) Motion the Appellants would have been able to discover material facts that GM and Petty sought to conceal that precluded Summary Judgment. For Example;

**A.** After the Court's Summary Judgment ruling, the Appellants discovered the Citizen's Bank litigation and that it was within the knowledge and possession of GM through Petty and his attorney son Wayne Petty who participated in that action and, Wayne Petty's Citizen's Bank file but, intentionally withheld from the Appellants [R. 2260 12/27/07]. This litigation precludes summary judgment and contradicts GM's statement of facts at ¶6 [R. 603], Petty's testimony at ¶¶'s 5, 6 [R. 970][17] and the Trial

[17] Petty testified the $38,000 was a loan. Strand testified the $38,000 was not a loan but in exchange for over $100,000 of Global Stock that was being held by the Citizens Bank [R. 1775¶15].The litigation supports Strand and Nupetco's standing in the action.

Court's conclusion the Nupetco's acquisition of the Property at the Citizens bank foreclosure sale in 1985 was a possible wrongful act imparting constructive notice to Strand [R. 2711]. The Citizen's Bank foreclosure was an act of extortion [*See* Addendum at 3, Affidavit of Strand at ¶12 and Addendum at 4, Second Amended Complaint at ¶¶'s 36, 37, 38, 46, 62-66]. Strand owed no money to The Citizen's Bank on the date of its foreclosure sale [See Addendum at 5 Affidavit of Lohr Livingston at ¶7 and Addendum at 4, Second Amended Complaint at ¶72]. Nupetco's purchase of the Property was not an independent purchase by a corporation for it's own benefit, nor a wrongful act, but rather, it was an agreed upon transaction by two longstanding business associates (Petty and Strand) to protect Strand and his Property from the Citizen's Bank extortion attempt [See Addendum 3 pg. 21, ¶78].

**B.** The Appellants were also clearly prejudiced by not being given the right to discover information about GM's Notice to Quit and about the lease that GM used in support of it's Motion [R. 975, 654-657, 656-657]. By denying the Appellants' Motion to Compel answer to Interrogatory No. 10 [R. 539-540] and Request for Production of documents no. 59, [R. 463] (seeking information about the Notice to Quit (the demand for furniture allegedly belonging to Nupetco) and the Appellant's Rule 56(f) Motion (seeking information about the lease)) [R. 1495-1519], the Trial Court (Judge Dawson) precluded the Appellants from discovering at the initial stages of the case and prior to the Court's summary judgment ruling that (i) the source of Nupetco Associates' claim of entitlement to Strand's furniture arises from Judge Dawson's, Petty's and Nupetco's involvement and participation in a 1989 IRS collection action against Strand (ii) that on

04/18/1989 the IRS (represented by then prosecutor and now Judge Dawson) seized the identical property that is the subject matter of this eviction action as being Strand's, and (iii) that the issue of ownership of the property and the furniture along with the validity of the 1985 lease were disputed and rights and possession were determined in favor of Strand. The documents involved; (i) The stipulation signed by Judge Dawson as a former prosecutor [R. 2975-2976] (ii) Strands letter to Mr. Vano [R. 2978-2979] (iii) Nupetco's request for return of wrongfully levied property and Petty's supporting affidavit that relied on the same 1985 lease that Golden Meadows submitted in support of its Motion for Summary Judgment purporting it to be valid and binding and without challenge [R. 2985-2997] along with; (iv) the Subordination agreement entered into by the parties on 07/18/1989 whereby Strand paid for the release of his property (the furniture and the fixtures attached to and belonging to the Property) [R. 2999-3000], contradict the Trial Courts Summary Judgment Ruling at R. 2704-2705 and 2708-2712, GM's statements of facts ¶¶'s 7 through 9 [R.603-604 ], the Affidavit of Petty at ¶¶'s 7-9 [R. 970] and, the Trial Court's conclusion in the Summary Judgment ruling at pg. 3 second to last line, that: "Absent the Lease, the residence that is the subject of this action (the "Property") would still have belonged to Nupetco Associates ("Nupetco") following the 1985 trustee's sale and therefore could not have been attached by Strand's creditors."[R. 2704]

There are significant unresolved issues of material fact. Consequently, GM was not entitled to Summary Judgment as a matter of law. Where one party wrongfully denies another the evidence necessary to establish a fact in dispute, the court must draw the strongest allowable inferences in favor of the aggrieved party." (*National Associates*

*of Radiation Survivors v. Turnage*, 115 F.R.D. 543, N.S. Cal. 1987). Therefore, summary judgment should also be reversed.

## II. THE TRIAL COURT ERRED IN STRIKING AFFIDAVITS OR PORTIONS THEREOF OR; IN THE ALTERNATIVE; THE TRIAL COURT ERRED WHEN IT DID NOT GRANT MEANINGFUL OPPORTUNITY TO CORRECT THEM.

This Court should reverse the Trial Court's order striking the Feb 20, Feb 22 and Feb 28 Affidavits or portions thereof for failure to conform to Rule 56(e) or Rule 702 [R.2213-2217]. "A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers[18]." "District Courts must take care to insure that pro se litigants are provided with proper notice regarding the complex procedural issues involved in summary judgment proceedings[19]", including the opportunity to resubmit affidavits to conform with Fed. R. Civ. P. R. 56(e) *See Jaxon*, 773 f. 2d at 1140 (reversing summary judgment where district court refused to permit pro se litigant to resubmit affidavits to conform with Rule 56(e))."

By not receiving the Affidavits and or Affidavit testimony submitted by the Appellants and others in opposition to GM's Motion for Summary Judgment, the Trial Court failed to determine the existence of issues of fact. As discussed herein, the Appellants disputed each of the key facts raised by GM, therefore the Court erred when it did not liberally construe the Appellants' pleadings and affidavits or grant meaningful

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[18] *Haines v. Kerner* 404 U.S. 519, 520-21, 92 S. Ct. 594 30 L. d 2d 652 (1972); See also *Hall v. Bellmon*,. 935 F. 2d 1106. 110 (10th Cir. 1991); *Estelle v. Gamble*, 429 U.S. 97, 106, 97S. Ct. 285, 292, 50 L. Ed. 2d 251 (1971) *Gillihan v. Shillinger*, 872 F. 2d 935, 938 (10th Cir. 1989).

[19] *Jaxon v. Circle K Corp.*, 773 F. 2d 1138, 1140 (10th Cir 1985) (quoting *Garaux v. Pulley*, 739 F. 2d 437, 439 (9th Cir. 1984); See also Hall, 935 F. 2d at 1110 n. 3

opportunity to correct them. Even if there were some conclusory statements in the affidavits, those statements did not prejudice GM and did not justify striking the admissible statements. *See Broadwater v. Old Republic Surety*, 854 P. 2d 527, 533 (Utah 1993) and, *State Farm Fire and Casualty v. Forced Aire L.C* 2009 UT App 15.

## III. THE TRIAL COURT ERRED IN STRIKING AFFIDAVITS THAT WERE FILED AND SERVED CONCURRENTLY WITH THE RESPONSE MEMORANDUM ON GROUNDS OF LACK OF TIMLINESS

The Trial Court accepted the Affidavit of Joe Scovel and the Appellants' Responsive Memorandum in opposition to GM's Motion for Summary Judgment that were served at 9:20 a.m. on 02/22/2008, as timely[20]. Therefore, the Court denied the Appellants' substantial rights to due process and erred when it resolved doubts as to admissibility in favor of the movant[21] and struck the personal affidavits of Strand and Allen (and all exhibits attached thereto) for lack of timeliness when they were also timely served on 02/22/2008 at 9:20 a.m. [R. 2215 ¶¶'s 5-6].

Statute of limitations and a wrongful act against Strand were at issue [R. 609-616, 2708-2712]. The Trial Court erred when it found (i) that a confidential relationship, a wrongful act or unjust enrichment was not plead by the Appellants in their Counterclaim and adopted GM theory that Strand's constructive trust claim was barred by the statute of limitations and (ii) that there were only two possible wrongful acts imparting constructive notice Strand; Nupetco's acquisition of the Property at the Citizen's Bank foreclosure

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[20] [R. 2703 at ¶2, 2214 at ¶ 3 and Tr. R. 4301 at pg 40 lines 22-25 and pg. 41 lines 1-3 ].

[21] Doubts should be resolved in favor of the non-moving party. *Bowen v. Riverton City*, 656 P.2d 434, 436 (Utah 1982).

sale in 1985 or the 07/21/2000 conveyance of the Property by Nupetco to LFI.

In their Counterclaim, the Appellants alleged that (i) Strand had allowed his home to be titled in the name of GM and its predecessor in interest to hold for Strand's benefit, use and advantage [R. 45 ¶19] (ii) that GM was placed as a fiduciary over the property [R. 46 ¶30], (iii) at the time that Strand agreed that title could be placed in the name of GM, both parties understood, knew, acknowledge and affirmed that the property was being placed in GM name, in trust, with the complete and clear knowledge and understanding that GM was acting as trustee [R. 47 ¶34 ] and, (iv) that at the time that the instant lawsuit was filed, GM immediately breached its fiduciary duty by attempting to deprive Strand of the value of hundreds of thousands of dollars of which the property is worth and to dispossess him of the habitation and rest in such property [R. 46 ¶31].

A fiduciary relationship and a confidential relationship are considered one and the same. *See First Sec. Bank N.A. v. Banberry Dev. Corp.*, 786 P. 2d 1326, 1332 & n. 18 (Utah 1990)[22]. Generally, in a fiduciary relationship, the property, interest or authority of the other is placed in the charge of the fiduciary. *Dennison State Bank*, 230 Kan. At 640 P. 2d at 1241 (citation and emphasis omitted). Equity imposes a constructive trust to prevent one from unjustly profiting through fraud or the violation of a duty imposed under a fiduciary or confidential relationship, and such trust may arise when the confidential relationship is abused by the promissor.

In its Motion to Strike the Affidavits of Strand and Allen for failure to comply

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[22] (using the terms interchangeably and citing cases for the proposition that fiduciary relationship and confidential relationship are ordinarily convertible terms).

with Rule 56(e) or for the reasons stated in GM Motion in Limine [R. 1881-1885, 1888-1893], GM (improperly) objected to the testimony that explained (i) the facts surrounding the transactions, (ii) the parties intent and; (iii) that Nupetco's acquisition of the Property at the Citizen's Bank foreclosure sale in 1985 and the July 2000 conveyance of the Property by Nupetco to LFI were not wrongful acts imparting constructive notice Strand. But, GM did not object to Strand's affidavit at ¶35 [R. 1779] which states: "At no time has Petty ever stated to me that he believed that either Nupetco or the plaintiff owned my home until August 2007 when I was served the Notice to Quit."

When a case involves a trust, a trustee cannot take advantage of a statute of limitations defense until something has occurred to give the beneficiary a "clear indication" that a breach or repudiation has occurred, or, alternatively, the circumstances must be "such that [the beneficiary] must be charged with knowledge" *Walker v. Walker*, 17 Utah 2d 53, 404 P. 2d 253, 257 (Utah 1965). A trust is a form of ownership in which legal title to property is vested in a trustee, who has an equitable duty to hold and manage it for benefit of beneficiaries. *See Continental Bank & Trust Co. v. County Club Mobile Estates Ltd.*, 632 P. 2d 869 (Utah 1981) and, *In re Estate of Flake*, 71 P. 3d 589 (Utah 2003)). Where a trustee is sued by a beneficiary or claims a violation of the trust, it constitutes an "exceptional circumstance" calling for the application of the discovery rule, *Snow v. Rudd*, 2000 UT 20. Therefore, by failing to liberally construe the Appellant's Answer and Counterclaim and by striking Strand's affidavit at ¶35 on alternate grounds of timeliness, the Court failed to acknowledge material facts submitted by Appellants' concerning the statute of limitations governing the Appellants

Counterclaim and their Defenses and applied the statute of limitations against Strand inequitably and improperly.

This Court should reverse the Trial Court's order striking the Feb 22 personal Affidavits of Strand and Allen [R. 2215 ¶¶'s 5-6]. The Trial Court abused its discretion in striking affidavits that were filed and served concurrently with the responsive memorandum. GM had adequate opportunity to respond to the statements in the affidavits and no rule prohibited the filing of the affidavits. For the reasons stated above with respect to Strand's affidavit at ¶35 and for the additional reasons discussed herein, Strand and Allen's Feb. 22 personal affidavits create issues of fact precluding summary judgment. Therefore the Trial Court's grant of summary judgment should be reversed.

## IV. THE TRIAL COURT ERRED IN STRIKING AFFIDAVITS FILED AFTER THE INITIAL RESPONSE MEMORANDUM WHERE THE MOVANT HAD ADEQUATE OPPORTUNITY TO REVIEW THE STATEMENTS IN THE AFFIDAVITS AND NO RULE PROHIBITED THE FILING OF THE AFFIDAVITS

In its Motion for Summary Judgment GM claimed that there was no dispute that Nupetco purchased the Property for $190,000 at the (Citizen's Bank) foreclosure sale with it's own funds for its own benefit [R.603 ¶6] and that GM paid the property taxes in full for the years 2000 through 2007 using its own funds [R. 606 ¶21]. These facts were clearly disputed and the source of funds was contested [See R. 1839 ¶ 7-9 and R. 1773-1775 at ¶¶'s 4, 17 and 18].

In its Feb 22 Motion to Strike the Feb. 22 affidavit of Strand, GM claimed that ¶¶'s 4, 17 and 18 to Strand's Affidavit that disputed these facts were vague or incomplete and should be rejected [R. 1891-1892]. In response, on Feb 28, the Appellants filed memoranda in opposition to the motion to strike [R. 1933] and provided supplemental

affidavits of Strand [R. 1949, 2002] and Allen [R. 1930] along with affidavits by Charles Dooley [R. 2033] and attorney Dan Jackson [2073].

GM requested that the Appellants' response to the Motion to Strike the affidavit of Strand be filed and served on 02/28/2008 [R. 1897]. Even though the Court did not enter GM' proposed order granting it's motions to reduce time for Appellant's response [R. 2113], when the affidavits were served on Feb 28 in response to GM' Motion to Strike, the next day, on 02/29/2008, GM moved to strike them arguing lack of timeliness [R 2066, 2068].

GM could not claim they were in anyway prejudiced by the receipt of the Supplemental Affidavits of Strand and Allen and the affidavit of Charles Dooley that the Appellants' served by hand-delivery on February 28 or the affidavit by Attorney Dan Jackson that was sent by way of facsimile the evening of Feb. 28. They were served by the deadline requested by GM.

Under Rule 56(c) of the Utah Rules of Civil Procedure, summary judgment is determined based on the affidavits and other materials "on file." This Court should reverse the Trial Court's order striking the Feb 28 affidavits as untimely. The Trial Court abused its discretion in striking affidavits filed after the initial response memorandum where GM had adequate opportunity to review and respond to the statements in the affidavits and no rule prohibited the filing of the affidavits. Rule 7(c)(1) prohibits the filing of additional memoranda beyond the initial memorandum, response, and reply, but nothing in the rule prohibits filing additional affidavits. Moreover, the Affidavits (i) were timely served in response to GM Motions to Strike and (ii) served concurrently with the

Appellants' Memorandum in Opposition to the Motions to Strike.

The Court erred when it did not consider the Feb 28 affidavits but heard GM motions to Strike the Appellant's Feb 20, Feb 22 and Feb 28 Affidavits on March 3 in conjunction with the Motion for Summary Judgment. As discussed herein, these affidavits create issues of fact. The Trial Court's grant of summary judgment should, therefore, also be reversed.

## IV: SUMMARY JUDGMENT WAS PRECLUDED BECAUSE THE MATERIAL FACTS WERE DISPUTED

On Summary judgment motion, the purpose of affidavits is "only to determine whether a material issue of fact exists, not to determine whether one party's case is less persuasive than another's or is not likely to succeed on the trial of the merits." [23] "Summary judgment is never used to determine what the facts are but only to ascertain whether there are any material issues of fact in dispute.[24] "it is not the purpose of the Summary Judgment procedure to Judge the credibility of the averments or parties, or witnesses or the weight of evidence" [25]"[I]t only takes one sworn statement under oath to dispute the averments of the other side of the controversy and create an issue of fact." [26] Rule 56(e) of the Utah Rules of Civil Procedure establishes three minimum requirements for affidavits supporting a summary judgment motion: (1) the affidavit "be made on

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[23] *Ron Shepherd Insurance, Inc. v. Shields*, 882 P.2d 650, 655 (Utah 1994) (citation omitted).

[24] *Hill v. Grand Central, Inc.*, 25 Utah 2d 121, 123, 477 P. 2d 151 (1970).

[25] *Holbrook Co. v. Adams* 542 P. 2d 199, 193 (Utah 1975)

[26] *Holbrook Co. v. Adams*, 542 P.2d 191, 193 (Utah 1975).

personal knowledge," (2) set forth facts "admissible in evidence," and (3) "show affirmatively that the affiant is competent to testify to the matters sated therein." Doubts should be resolved in favor of the non-moving party.[27] Summary Judgment is permissible "only when the matter is clear; and in case of doubt should be resolved in allowing the challenged party the opportunity of at least attempting to prove his right to recover." [28] "If there is any doubt or uncertainty concerning questions of fact, the doubt should be resolved in favor of the [non-moving] party."[29] "On review of a grant of summary judgment to a plaintiff, the inquiry is whether there is any genuine issue as to any material fact, and if there is not, whether the plaintiffs are entitled to judgment as a matter of law"[30]. Because there were disputed issues of material fact summary judgment could not issue in this action by the Trial Court.

**1.** The nature of Strand and Petty's relationship, the facts surrounding the Citizen's Bank foreclosure sale, the source of funds used and for whose behalf the purchase was made, the lease, the parties intent and Strand's occupancy of the home without a claim ever being made against him were at issue in this case. *See* GM's Statement of Facts at at ¶¶'s 2, 6, ¶7, ¶8 and ¶10 [R. 603-604] and the Affidavit of Petty at ¶¶'s 2 -9 [R. 969-972].

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[27] *Bowen v. Riverton City*, 656 P.2d 434, 436 (Utah 1982).

[28] *Durham v. Margetts*, 571 P.2d 1332, 1334 (Utah 1977).

[29] *Wilkinson v. Union Pac. R.R.*, 975 P.2d 464 (Utah 1998) (citation omitted, brackets by the court).

[30] *Thorncock v. Cook* 604 P.d 934 (Utah 1979)

a) The Trial Court erred when it resolved doubts as to admissibility in favor of the movant and struck the affidavit testimony of Strand's former wife Lois Williams at ¶ 4 second, third and fourth sentences for lack of foundation [R. at 4301Tr. pg. 17 lines 2-25, pg. 18 lines 1-4, pg. 20 lines 4-6], despite the objection of both pro-se Appellants[31] and despite the Appellants' "newly engaged" counsels oral motion for leave to correct deficiencies and his objection that Ms. Williams was stating her involvement and understanding of the agreement, her understanding based on discussions with the parties, and her involvement in the transaction, which was within her own personal knowledge which she, as an owner of the property and as a signatory to the lease, has the ability as a witness to testify to at trial [R. 4301 Tr. pg. 9 lines 6-25 and pg. 10 lines 1-7].

If the Trial Court had admitted this testimony [R. 1814 at ¶4]:

> Lois (Strand) Williams: " I can however attest that by agreement with Michael, Neuman Petty purchased the mortgage held on our home from Citizen's Bank and Michael and I signed a lease with Neuman on the house in the mid eighties that was somehow involved with our assets in the oil field. There was never any rent or lease payments made or requested. It was understood between myself, Michael and Neuman that Neuman was just protecting our home and that Neuman's company, Nupetco did not in reality own it."

, there would have been a material fact that would have precluded Summary Judgment because this testimony contradicts GM's statement of facts at ¶¶'s 6-8 and 10[R. 603-604] and Petty's Affidavit at ¶¶'s 5, 6, 8 and 9 [R. 970 ] that was relied on by GM in

[31] That ¶4 second sentence is based on her own personal knowledge she was married to Strand and knows what she understood and ¶4 fourth and fifth sentence that she is testifying to facts based on her own personal knowledge and her state of mind which is relevant and an exception to the hearsay rule as statements describing or explaining the event while the declarant was perceiving the event [R. 1914-1921]

Support of it's Motion for Summary Judgment. This Court should reverse the Trial Court's order striking Affidavit of Lois Williams at ¶4 second, third and fourth sentences. Her testimony presented competent admissible evidence based on personal knowledge and created issues of fact precluding summary judgment. Therefore, the Trial Court abused its discretion when it did not interpret the affidavit liberally and or when it denied the Appellants' "newly engaged" counsel's oral motion to correct any deficiencies.

b) The Trial Court found that the source of funds that were used to purchase the home at the Citizen's Bank foreclosure sale was contested and erred when it not only weighed Strands testimony [R. 2704 ¶6] but, resolved doubts as to admissibility in favor of the movant and struck the exhibits and affidavit testimony of Strand at ¶¶'s 17-18 [R. 1775] that:

> "by mutual agreement between Neuman Petty, myself, Lhor Livingston (Senior Vice President of the Citizen's Bank) and Gary Harris (President of The Citizens Bank) for my benefit, Nupetco paid $190,000, the amount due to the Citizens Bank on my home, with my money, at my instruction. In preparation for this transaction I assigned a secured judgment in my favor to Nupetco that I had against Leland Martineau in an amount over $522,796.72 plus interest (The security being a new automobile dealership, building and land in burley Idaho (Magic Valley Motors.) See Exhibit F.)" [Exhibit F- R. 1797-1799][32].

This testimony provided express statements of fact based on solid foundation and a personal knowledge of the affiant and is corroborated by the Affidavit of attorney Dan Jackson at ¶¶'s 10 through 18 [R. 2075-2076], Strand's supplemental affidavit [R. 1952,

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[32] In paragraph 19 to his 02/22/2008 Affidavit, Strand also testified that it was his memory that there actually was not a foreclosure sale and provided a letter dated September 5, 1985 from Wayne Petty to the title company to show that the $190,000 was a known figure, agreed to in advance, and prior to the sale. See also ¶¶'s 16-17 to attorney Dan Jacksons affidavit at Addendum at 6 and Strand's Deposition testimony referenced in herein.

1953¶¶'s 4-5] and by, i) the Appellants answers to GM's Requests for Admissions and, ii) Strands Deposition testimony that GM filed in support of it's Motion for Summary Judgment (referenced herein).

If the Trial Court had admitted Strand's testimony there would have been a material fact that precluded Summary Judgment because this testimony contradicts GM's statement of facts ¶¶'s 6-8 and 10 [R. 603-604] and Petty's affidavit at ¶¶'s 5, 6, 8 and 9 [R.970] that was relied on by GM in Support of its Motion for Summary Judgment. This Court should reverse the Trial Court's order striking Affidavit of Strand at ¶¶'s 17-18. The testimony creates issues of fact precluding summary judgment.

c) The Appellants provided testimony by attorney Dan Jackson who has been a member of the Utah State Bar since 1979 [R. 2073 – 2091]. The next day, GM moved to strike this affidavit arguing (i) failure to conform with Rule 56(e), (ii) lack of timeliness and (iii) failure to disclose witness testimony [R. 2068-2072]. Dan Jackson was designated as a witness by both parties [R. 253, 260][33]. At the hearing held on March 3, 2007 the Court struck the affidavit for lack of timeliness because it did not make it to his desk in time to prepare for the hearing [R. 4301 (03/03/08) Tr. pg. 46 lines 1-5 and 2215 ¶7]. In spite of these facts the order striking this affidavit states that it was stricken on the grounds listed in GM's motion to strike [R. 2215 ¶7]. However, during the September 3, 2008 telephonic hearing conducted on the Appellants' Rule 59 motion

[33] Prior to their receipt of the Affidavit the Appellants' did not know what Mr. Jackson would testify to. When they received his affidavit they amended their disclosure of witnesses [R. 2057, 2060] in the exact same manner as GM [R. 1128] but, irrespective, at the hearing held on March 3, 2008 the court stated that failure to disclose witnesses does not preclude a witness from submitting an affidavit [R. 4301 pg. 7 lines 1-5].

the Court reviewed this affidavit and found that it is mainly conclusory, contains legal argument and would not have been helpful to the Court when it considered the Motion for Summary Judgment [R. 4304 (09/03/08) Tr. pg. 45 lines 10-20].

If the Court had admitted Dan Jackson's testimony at ¶¶'s 1 through 18 [R. 2073-2091, Addendum at 6], there would have been a material fact that precluded Summary Judgment because this testimony contradicts GM's statement of facts ¶2, ¶6 (second line), ¶7, ¶8, and ¶10 [R. 602-604] and the Affidavit of Petty at ¶¶'s 5, 6, 8, and 9 [R. 970] that was relied upon by GM in support of it's Motion for Summary Judgment.

This Court should reverse the Trial Court's order striking the Affidavit of attorney Dan Jackson. The affidavit provided express statements of fact based on solid foundation and a personal knowledge of the affiant and clearly creates issues of fact precluding summary judgment.

d) The Trial Court erred when it found that Strand's adverse possession claim was barred by the Statute of Limitations and that Strand was unable to demonstrate any seven-year period when Strand possessed the Property adversely and paid all the taxes thereon [R. 2702 ¶7]. The validity of the lease was disputed but irrespective, because of the close relationship between Strand and Petty, the prescriptive running is not affected. These facts must be construed in favor of Strand. Even after consideration of their close relationship it is asserted that Petty thought of Strand as a family member[34]. The lease does not destroy Strand's adverse possession of the property. He has both a claim to the property as an occupying claimant and a possessory right which was open; notorious,

[34] [R. 1773 ¶6, 1835 ¶7, 1829 ¶5, 1833¶8, 1753-1754 ¶3]

adverse and hostile to the now claimed interests of Petty for in excess of 20 years [R. 1772-1773 ¶2, ¶5, 1848].Strand testified that he made valuable improvements to the property and that he paid the taxes for 28 years (1976-2004)[35]. The lease if it were valid, would not act as a bar to the running of a prescriptive period with persons of close relationships (*See Totman v. Malloy* 431 Mass. 143, 725 N.E. 2d 1045 9 Mass., 2000)). Because of the relationship of the parties laches would bar GM's claim.

**2.** A Deed can be shown to be held in trust, *Haws v. Jensen*, 209 P. 2d 229, (Utah 1949). GM sought to establish the fact that Nupetco owned the property from 1985 until 2000. The fact that Nupetco allowed the Strand's to occupy the property pursuant to the 1985 lease and then at the will of, and permission of, Nupetco. The fact that the property was sold to LFI, and the fact that GM became the owner in 2004 as a result of a Trustee's Sale and Trustee's Deed, based on the Appellants prior testimony in matters unrelated to the present litigation [R.603¶9, 604-605 ¶¶'s 13-18,].

In support of this theory GM relied on the legal argument put forth in it's Motion in Limine to preclude the Appellants' from disputing these alleged facts and, on a case that is diametrically against them – *Schroeder v. Pratt*, 21 Utah 176, 185-186, 60 P. 512 (Utah 1900) ("Where a transaction is tainted with fraud, as between the parties to it, a court will not assist either, but will leave them in the position in which they have placed themselves."). As a preliminary matter, in *Schroder v. Pratt*, the court held that if evidence is erroneously excluded by the Court below in the record, the Appellate Court

[35] [1773 ¶¶'s 3-4, 1781-1786 and 1951-1952 ¶'s 3, 13-19, 77-89]

can consider it. Secondly, the Court held that if a mortgage lacks consideration and is fraudulently entered into, the Court will not enforce it but instead will leave the parties in the position that they have placed themselves. Because the 1985 lease and the 07/21/2000 mortgage between LFI and GM were based on fraud, the Court should not have used that lease or mortgage to change anyone's interests. The Trial Court should have left the parties in the position that they placed themselves; with GM holding legal title and Strand in possession of the property and holding equitable title.

The error with the Trial Court's ruling is that (i) it did not hear the Motion in Limine [R. 2702] and, (ii) the blatant failure by GM to establish that "he [Neuman Petty and or Nupetco, and or GM]...has done something or omitted to do something in reliance on [Mr. Strand's and or Ms. Allen's] testimony in the earlier proceeding[s]," much less that he did not have "equal knowledge of the facts." GM never, in any way, pled or claimed reliance on the Appellants prior testimony – not in it's Motion in Limine, not in its Motion for Summary Judgment, not in Neuman Petty's supporting affidavit, nor in any other pleading or affidavit. Nor is it possible to infer reliance by GM because there are no facts, actual or alleged, anywhere in this case, from which reliance may be inferred. For this reason alone, the Trial Court committed reversible error.

The Trial Court erred at the hearing held on March 3, 2008 when it adopted GM's theory that the affidavits of Strand and Allen should be read in the context of the legal arguments that each side was making [R. Tr. pg. 50 lines 9-25] rather than determine whether a material issue of fact exists. The purpose of affidavits is "only to determine whether a material issue of fact exists, not to determine whether one party's case is less

persuasive than another's or is not likely to succeed on the trial of the merits."[36] By adopting GM' legal argument and striking the affidavit testimony submitted by the Appellants and others in opposition to GM statement of facts ¶ 2 and ¶¶'s 6 through 22, the Court (i) precluded the Appellants from asserting their defenses of equitable and promissory estoppel (ii) ignored relevant issues of material fact and; (iii) gave no deference to the pro-se litigants including the right afforded by the Utah Rules of evidence to explain any perceived inconsistency in their testimony Utah R. Evid. 613(b). Had the Court admitted Strand's affidavit testimony and exhibits at ¶¶'s 4, 6, 7, 9, 10, 12, 13, 15, 17 - 30, 34, 35, 37 [R. 1773-1780 / Exhibits 1781-1809] and; Allen's affidavit testimony and exhibits [R. 1753-1757 at ¶¶'s 2-19/ Exhibits 1558-1770], it would have found that (i) there was no consideration (ii) that all the parties understood and agreed that the home was being held in trust for Strand for a period of over 25 years, (iii) that a confidential relationship between Strand and Petty existed (iv) that Nupetco, LFI (its creditor) and GM had been put on notice as to Strand's claims to such property and were not bone fide purchasers[37] (v) that repudiation of the trust did not occur until the filing of this eviction action and; (vi) that the Appellants relied on Petty's promises and assurances to them and were induced to act a certain way.

By striking Strand and Allen's testimony the Trial Court failed to observe the doctrine of equitable and promissory estoppel and erroneously found that Strand's claims

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[36] *Ron Shepherd Insurance, Inc. v. Shields*, 882 P.2d 650, 655 (Utah 1994) (citation omitted).

[37] *Chadwick v. Arnold* 34 Utah 48, 95 P. 527 (Utah 1908)

to the Property were barred by the Statute of Frauds. The Trial Court committed error when it accepted GM's alleged facts and refused to allow Appellants to present their set of facts, *Winegar v. Froerer et.al*, 813 P. 2d 104 (Utah 1991). Since the Appellants' testimony involves the facts surrounding the transactions and the parties intent, the Trial Court's rejection of their version of the facts concerning motive and intent, is in repudiation of their credibility as well. Weighing parties' credibility is also improper – *Masters v. Worsley*, 777 P. 2d 499 (Utah Ct. App. 1989) – and is another error by the Trial Court requiring this Court to reverse the Trial Court's grant of Summary Judgment.

The Appellants' prior testimony and statements made by others in prior unrelated actions did not constitute judicial admissions and their Affidavits in opposition to GM's Motion for Summary Judgment and Strand's deposition testimony not only offered proof of a "long-established relationship of trust" between the Appellants and Petty but established the equitable and promissory estoppel exception to the statute of frauds.

**A.** Utah courts define equitable estoppel as "conduct by one party which leads another party, in reliance thereon, to adopt a course of action resulting in detriment or damage if the first party is permitted to repudiate his conduct." *United Am. Life Ins. Co. v. Zion's First Nat'l Bank*, 641 P.2d 158, 161 (Utah 1982).[38]

**B.** Promissory estoppel has been extended in a limited form to cases concerned with the statute of limitations or the statute of frauds, where the promise as to future

[38] see also Black's Law Dictionary 571 (7th ed. 1999) (defining equitable estoppel as "[a] defensive doctrine preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way".

conduct, constitutes the intended abandonment of an existing right of the promissor. *Easton v. Wycoff,* 295 P. 2d 332 (Utah 1956). *See Fericks v. Lucy Ann Soffe Trust,* 100 P. 3d 1200 (Utah 2004):

> "To establish the promissory estoppel exception to the statute of frauds, the acts and conduct of the promissor must so clearly manifest an intention that he will not assert the statute that permit him to do so would be to work a fraud upon the other party."

The Appellants' Affidavits in opposition to Summary Judgment; Strand at R, 1777-1780 ¶¶'s 27-30, 34, 35, 37 and Allen at R. 1754-1756 ¶¶4-19 satisfy the elements of equitable and promissory estoppel . They allege that: Petty misrepresented the nature and scope of the LFI transaction and GM's foreclosure sale as to the present and the future, that the Appellants reasonably relied his representations and that the representations were clear and material and made in an attempt to induce the Appellants to agree and act in a certain way and that by filing this eviction action, Petty changed positions to the Appellants' detriment.

GM never addressed those points, by sworn testimony, nor in it's Motion for Summary Judgment mor it's in reply in Support of it's Motion. Nor is it possible to infer that GM denied Petty made these promises and assurances to them because there are no facts, actual or alleged, anywhere in this case, that these representations were not made.

Therefore, the Trial Court erred by striking the Appellants' affidavits and granting Summary Judgment against them and by denying their discovery motions in reliance on that prior testimony. *See Orvis v. Johnson* 177 P. 3d 600 (UT 2008). The grant of summary judgment should therefore be reversed.

**3.** The Trial Court adopted the most extreme view it could possibly adopt

against Strand in viewing the facts. When deciding a motion for summary judgment, pleadings, depositions, admissions and affidavits should be looked at in light favorable to position of party opposing summary judgment. Facts are to be viewed in light most favorable to the one opposing summary judgment, *Anderson Development Co. v. Tobias*, 116 P. 3d 323 (Utah 2005). Rather than utilizing this "perspective" the Trial Court did the opposite. For Example:

**A.** In its Summary Judgment Order, the Trial Court found that: "Strand claims that Petty breached the 1982 Agreement by having Nupetco purchase the Property at foreclosure sale when Petty was, according to Strand, contractually obligated to pay off the Citizens Bank Trust Deed and thereby leave the Property in Strand's name. Strand Depo. at 106."[R. 2709 ¶4] - Whereas; the actual testimony given by Strand states that Petty did not breach the 1982 agreement. That Petty ultimately did what he said he would do – satisfy his obligation to the joint venture and protect Strands home, his parents home and his parents' rental property. That Petty worked with the Citizen's Bank and made business decisions for the benefit of Strand and Petty without the input of Strand. That Petty's decision to let the Property go to sale and purchase it at foreclosure in the name of Nupetco at the amount set by Strand ($190,000) was for the benefit of Strand and Petty and that Strand was fine with the arrangement.[39] The 1982 Joint Venture "Agreement" is the best evidence of its content [R. 652] and does not distinguish where or how Petty's

[39] [*See* Strands Depo. at 103 lines 24-25 [R. 626], 106 lines 8-25 [R. 627], 108 lines 12-25 [R. 628], pg. 109 lines 1-2 [R. 629], pg. 120 lines 13-25 [R. 630], 122 lines 1-25 [R. 632], R. 123 lines 1-25 [R. 633], 124 lines 1-4 [634], 126 lines 8-25 [R. 636], 127 lines 1-25 [R 637] and 128 lines 1-25 [R. 638] and 129 lines 1-25 [R. 639].

approximate $750,000 contribution to the joint venture would be spent. The continual characterization by GM during Strand's deposition and in support of its motion for summary judgment that the Agreement called for specific performance by Nupetco on specific obligations is erroneous.

**B.** In its Summary Judgment Order, the Trial Court found that GM's statement of facts ¶17 that relied on Ralph Petty's supporting testimony at ¶ 8 [R. 909-Exhibit 927-928] was not disputed and, "In the alternative to striking of Strand's Affidavit, the Court accepted at face value Strand's insistence that he "understood exactly what he was signing" when he said under oath that Nupetco conveyed the Subject Property to Log Furniture on 07/21/2000 and Golden received the Trust Deed and Trust Deed Note on the Subject Property." [R. 2706 at ¶ 17] - Whereas; the actual testimony provided by Strand's affidavit at states:

> "At the request of Petty, I signed an affidavit on August 1, 2003. In that Affidavit I testified that the property located at 1199 South 1500 East Bountiful Utah (my home) was owned by me before September 5, 2003. I understood exactly what I was signing, this statement was correct, and I believed and believe that regardless of Log Furniture's and plaintiff's involvement that I always have and still do own my home, the Property." [R. 1778 ¶30].

There is absolutely no foundation for Ralph Petty's allegation that he had made a mistake in drafting Strands 08/01/2003 affidavit and that <u>if</u> Strand had caught his mistake he would have corrected the date from September 5, 2003 to September 5, 1985. Strand objected to Ralph's testimony and unless there is a claim that Strand directly told Ralph Petty that Strand agreed that a mistake had been made, Ralph Petty's conclusion would not be admissible. It is an unsubstantiated conclusion. Ralph Petty's personal beliefs as to why Strand did not take or took certain actions do not constitute admissible

evidence, *See Treloggan v. Treloggan*, 699 P. 2w 747, 748 (Utah 1985). Additionally, at the time that Ralph Petty prepared the affidavit for Strand he was representing Strand's interests [R. 1778 ¶¶'s 29-30, 1756¶¶'s 18-19] and, Ralph Petty certified that he mailed the affidavit to opposing counsel (LFI's creditor) three days before it was even produced and signed by Strand.

Clearly the 08/01/2003 affidavit raises genuine issues of material fact and gave notice to MHS that Strand believed on 08/01/2003 that he owned the home and brings into question how could Ralph Petty's affidavit be accepted by the Court in a motion for summary judgment while all of the pro-se Appellant's affidavits or portions thereof that create issues of fact, were stricken.

**C.** In its Summary Judgment Order, the Court found that: "Moreover, Defendants: Admit that Michael Strand has not at any time conveyed his interests, equitable title and beneficial ownership to Neuman Petty or his alter ego's [sic] Nupetco Associates and Neuman Petty" [Footnote omitted][R. 2708 ¶3] - Whereas; the actual Response submitted by the Appellants in response to GM Interrogatory No. 1, was as follows [R. 659-670]:

"Deny. Pursuant to Neuman Petty's contribution to the November 16, 1982 joint Venture Partnership Agreement whereby part of Neuman Petty et al's contribution was to pay off the mortgages to Michael Strand's home, Michael Strand's parents Pages Lane home and Michael Strand's parents Dexter Street property; to protect Michael Strand's interests in and to among other things, his home, "the Property," upon agreement and mutual understanding between, Neuman Petty and Lhor Livingston, for Michael Strand's benefit, Citizen's bank conveyed title to Nupetco Associates, Neuman Petty's alter ego, upon payment of $190,000, the amount due to Citizen's Bank on Michael Strands home, the Property. Admit that Michael Strand has not at any time conveyed his interests, equitable title and beneficial ownership to Neuman Petty or his alter ego's Nupetco Associates and GM. It was understood with complete and clear knowledge between the parties that although Neuman Petty and his alter ego's Nupetco Associates and

subsequently GM took bare legal title, that they held the Property in trust for the benefit of Michael Strand."

**D.** The Court struck the Affidavit of Joe Scovel and the exhibits attached thereto, for failure to conform with Rule 702 [R.2214] and would not take the Assumption [R. 1686 ]; the disclaimer that was signed by Allen and Petty (that GM also filed it in support of their motion for Summary Judgment [R. 691] and did not dispute it's authenticity [R. 4301 pg. 37 lines 21-22) or the letter from John Pitchar 1803-1804 (attached to Strand's affidavit) into account even though they demonstrate exceptions to title and the parties knowledge of Strands claims, including LandMark Title.

**E.** The Trial Court allowed GM to supplement the record with additional deposition testimony by Strand that GM claimed completely demolishes any chance of success with a confidential relationship claim [R. Tr. 121 lines 13-15] - Whereas; the actual testimony submitted by GM states that Strand allowed Petty to direct his business activities and make business decisions for the benefit of Strand and Petty without the input of Strand [R. 2187 - 2194 Depo at 476 lines 21-25 and 477 lines 1-25].

It is impermissible in determining a motion for summary judgment to indulge inferences and speculation adverse to the party opposing summary judgment as the Trial Court did herein. The Trial Court erred when it edited and misinterpreted Strand's affidavit testimony, the Appellants' Answer to GM's Request for Admission No. 1, and Strand's deposition testimony. By adopting GM interpretations of the testimony rather than look to the actual statements, which create issues of fact precluding summary judgment, the Summary Judgment was inappropriate and should be reversed. This Court should hold that Strand's Affidavit testimony, the Appellant's Answer to GM Request for

Admission No. 1 and Strand's Deposition testimony created genuine disputes of material fact that preclude summary judgment. The Trial Court should be reversed.

## VI. THE TRIAL COURT'S DECISION TO AWARD ATTORNEY FEES TO THE PLAINTIFF IN THE AMOUNT OF $113,301.15 WAS AGAINST CONTROLLING LAW AND AN ABUSE OF DISCRETION.

On the record on Wednesday, 03/05/2008, the Trial Court approved GM's request for attorney's fee's pursuant to §78-36-10.3 but, reserved ruling on GM's contention that the Appellants' Counterclaim is without merit and was not asserted in good faith and that it should be awarded attorney fees and costs for its defense against the Counterclaim pursuant to Utah Code §78-27-56[40]. Thereafter, James Swindler submitted his affidavit for fee's which he supplemented on May 7, 2008[41]. The Affidavits made no attempt to apportion and requested legal fees, costs and expenses in the amount of $113, 301.15 and spanned a period of approximately 8 months that covered almost every business day from August 21 through May 6, 2008 (an average of $758.50 per day).

It is well established in Utah law that "Generally, a party is entitled to attorney fees only as provided by contract or statute." *Cottonwood Mall Co. v. Sine, et al.*, 830 P. 2d 266, 269 (Utah 1992). Utah Code §78-36-10.3 only provides "for reasonable attorney fees" incurred in an unlawful detainer action which is an action to remove a tenant from possession and is not similar to a quiet title action. *Pearce v. Shurtz* 2 Utah 2d 124, 270 P. 2d 442 (Utah 1954). Therefore, the Trial Court erred when it adopted GM's position that it had no obligation to apportion its attorney fees and that it was entitled to attorneys fees

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[40] [R. 4301 Tr. pg. 139 lines 2-25, 140 lines 1-14]

[41] [R. 2233, 2943 (objection – 2358, 2354, 2378, 2350 / response 2512/ hearing 4302)]

for the work relating to its Complaint and the work relating to the Appellants' Counterclaim under Utah Code §78-36-10.3.

The duty to apportion as set forth in *Sine* at 269-270, ensures that attorney fees are awarded only to the extent authorized by Utah law. The trial court has no discretion to "award wholesale all attorney fees requested if they have not been allocated as to separate claims and/or parties." *Valcarce v. Fitzgerald*, 961 P. 2d 305, 3017 (Utah 1998). Utah appellate courts have continually enforced the duty to apportion attorney fees. *See Foote, et al. v. Clark, et al.*, 962 P. 2d 52, 55 (Utah 1998) (repeating 3 – element duty as set forth in *Sine*). In fact, the Utah Supreme Court has held that a fee award may be denied entirely if the party fails to apportion them. In *Eggett v. Wasatch Energy Corp.*, 2004 UT 28, ¶36, 94 P. 3d 193, the Court stated that rule as follows: "In order to recover any attorney at all, the prevailing party must apportion or separate out the recoverable fees from the non-recoverable ones." Id. ¶36.

An award of attorney fees made without adequate evidence to support it constitutes an abuse of discretion and must be overruled by Supreme Court. *Paul Mueller Co. v. Cache Valley Dairy Ass'n.* 657 P. 2d 1279 (Utah 1982). In *Broadwater v. Old Republic Sur., 854 P. 2d 527, 534* (Utah 1993), the district court failed to specifically find bad faith, but simply awarded attorney fees. The Supreme Court in Broadwater reversed on the award of attorney fees, and stated, "without making the appropriate findings as to the elements of 78-27-56, we cannot determine the basis of the award."

In ruling that the Appellants were responsible for GM's attorney fees on all aspects of this case under Utah Code §78-36-10.3, without a finding of bad faith, the

Trial Court made no investigation into: (1) the 37 *ex parte* contacts between GM and the court including an ongoing dialogue with the Court's law clerk [R. 2249-2266] who openly displayed his hostility to the Appellant's position during the Summary Judgment hearing held on 03/05/2008 [R. 2545-2546, 2575]; (ii) the fact that before this suit was initiated, GM, its counsel James Swindler, and Wayne Petty knew the scope and extent of Strand's claims by having received a draft copy of Strand's Third District Complaint against Petty and Nupetco and Strand's personal and legal information nor the 177 contacts and discussions between Mr. Swindler and Wayne Petty [R. 2249-2266] before he became co-counsel (iii) the impropriety of Wayne Petty's appearance as co-counsel in this case, against Strand, who was a client of Wayne Petty's, that Wayne Petty represented in aspects of the 1982 joint venture executed between Strand and his entities including B.I. Associates and Petty and his entities including Nupetco and the Citizen's Bank litigation - both of which involve the ownership of the Property. Even though this conflict was raised on 06/30/2008 [R. at pg. 17 lines 5-25 and 18 lines 1-12] (iv) why the Appellants were summoned to defend against one set of issues and then suddenly confronted with a new and different set of issues at the October 24, 2007 hearing and then again through GM's motion for summary judgment (iv) nor the discrepancy between Mr. Swindler's claim that his attorney fees for the case would be $10,000 [R.4299 Tr. pg. 6 lines 8-10, 24-25 and pg. 7 line 1] and the $113, 301.12 he subsequently submitted. The Trial Court stated that the numbers were striking, but, he approved them and stated that he approved GM' strategy and that he understood that the pro-se litigants complicated this case and complicated discovery [R. 4302 Tr. pg. 29 lines 13-23].

Because Summary Judgment could not issue in this action the grant of attorney's fees must be reversed. Because an action to quiet title does not provide for attorney's fees by statute or rule, and there was no apportionment, the award of attorney fees must also, be reversed.

## VII. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE APPELLANTS RULE 59 MOTION

The Trial Court precluded the Appellants from discovering evidence and information regarding the 1982 joint venture between Strand and his entities and Neuman Petty and his entities and any accounting concerning it or profits thereof. All of the argument in GM' Motion for Summary Judgment and, in part, it's Motions to Strike portions of Allen and Strand's testimony concerning the Trust, Constructive Trust and the statute of limitations, relate to GM's Motion in Limine where based on GM's argument, Strand and his claims are not relevant to this case. At the hearing held on GM's Motion for Summary Judgment the Court specifically indicated that it did not intend to make any ruling that would affect the Third District Court Case presently before Judge Iwasaki (Third District Court case no. 070915796). In spite of this fact, the Trial Court found that Strand's claims to the Property based on the 1982 Agreement were barred by the statute of limitations as of September 1991, at the latest [R. 4299 Tr. pg. 130, lines 2-9, 2709 ¶4 last line]. In this case, neither Appellant had actual or constructive notice that GM would claim ownership of the property until the filing of this eviction action. Petty did not repudiate the joint venture that held the house in trust, until 2005 [R.2606]. It is evident that the intent of the Summary Judgment motion filed by GM was to preclude prosecution of the Third District Case. The Trial Court's rulings constitute

irregularities concerning the statute of limitations governing the Appellant's Counterclaim. Clearly the Court abused its discretion by taking notice of the two possible wrongful acts against Strand that were alleged by GM and by not taking notice of the wrongful act alleged by the Appellants. These irregularities denied Mr. Strand a fair hearing. Both GM's and Petty's specific allegations about the facts surrounding the Citizen's Bank foreclosure and the parties' intent are contrary to the facts as stated by Wayne Petty, Nupetco and Strand in the Citizen's Bank litigation. The Court abused its discretion by not taking notice of these source documents that substantiated the Appellants' argument.

## CONCLUSION

Based on the foregoing, it can be determined that issues of fact precluding summary judgment did exist. This Court should accordingly reverse the Trial Court's rulings and hold that Strand's deposition testimony, the Appellants' answers to GM's requests for admissions, the Appellants' pleadings and the Affidavits of Lois Williams, attorney Dan Jackson, Strand, Allen and all other affidavits and exhibits referenced herein presented admissible evidence so there were disputes of material fact that precluded summary judgment. Neither Appellant had actual or constructive notice that GM would claim ownership of the home until the filing of this eviction action. Petty did not repudiate the joint venture that held the house in trust until 2005[R. 2606].

RESPECTFULLY SUBMITTED this 10 day of August, 2009.

Michael Strand

Cari Allen

CERTIFICATE OF SERVICE

I hereby certify that I caused to be delivered by the method indicated below two true and correct copies of The Appellants' Brief, postage prepaid if by mail, this 10 day of August, 2009, to:

____ FEDERAL EXPRESS
____ U.S. MAIL
__X_ HAND DELIVERY
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